COPYRIGHTED

WILMER, CUTLER & PICKERING
2445 M STREET, N.W.
WASHINGTON, D.C. 20037-1420

TELEPHONE (202) 663-6000
FACSIMILE (202) 663-6363

4 CARLTON GARDENS
LONDON SW1Y 5AA
TELEPHONE 011 (44171) 839-4466
FACSIMILE 011 (44171) 839-3537

RUE DE LA LOI 15 WETSTRAAT
B-1040 BRUSSELS
TELEPHONE 011 (322) 231-0903
FACSIMILE 011 (322) 230-4322

FRIEDRICHSTRASSE 95
BRIEFKASTEN 29
D-10117 BERLIN
TELEPHONE 011 (4930) 2022-6400
FACSIMILE 011 (4930) 2022-6500

JOEL ROSENBLOOM
DIRECT LINE (202)
663-6216

April 2, 1997

BY HAND

RECEIVED
APR 2 1997
Federal Communications Commission
Office of Secretary

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

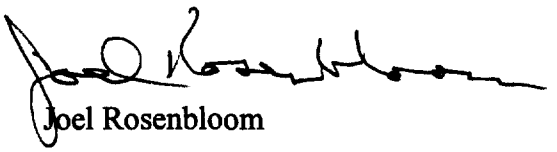
EX PARTE OR LATE FILED

Dear Mr. Caton:

Enclosed are an original and six (6) copies of "Reply Comments of ABC, Inc." in MM Docket No. 96-197, which we request be filed in that docket. The due date for such comments was March 21, 1997. We have ascertained that on that date, due to a failure of communication between the undersigned and this firm's messenger, the messenger delivered the original and six copies intended for filing, not to your office, but to the Chairman's office (where he obtained the date stamp shown on the pleading's cover page). However, as the certificate of service attached to the document states, on March 21, 1997, copies of these Reply Comments were served upon the members of the Commission and relevant members of the Commission's staff, as well as those parties to the proceeding to which the Reply Comments refer. We are advised by Mr. Roger Holberg, of the Policy and Rules Division of the Mass Media Bureau, that the pleading has been and is being given substantive attention. Thus, filing the document in MM Docket No. 96-197 would conform the Commission's records to the realities of the situation, without causing prejudice to any party.

If there are any questions with respect to this matter, please communicate directly with the undersigned.

Respectfully,



Joel Rosenbloom

cc: Roger Holberg, Esq.
Room 550
2000 M St., N.W.

No. of Copies rec'd 0+4
List ABCDE

RECEIVED
APR 2 1997
Federal Communications Commission
Office of Secretary

MAR 2 1 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Newspaper/Radio Cross-Ownership	)	MM Docket No. 96-197
Waiver Policy	)	

To: The Commission

REPLY COMMENTS OF ABC, INC.

Of Counsel:

Alan Braverman
Senior Vice President &
General Counsel
Sam Antar
Vice President - Law &
Regulation

ABC, Inc.
77 West 66th Street
New York, New York 10023

Joel Rosenbloom
James S. Campbell
Ali Stoeppelwerth

Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6216

Counsel for ABC, Inc.

March 21, 1997

TABLE OF CONTENTS

SUMMARY

The stringent newspaper/radio waiver policy that the Commission now follows cannot be justified on the ground that daily newspapers have unique "influence" in the marketplace of ideas, substantial market power in the sale of advertising, or both. No factual basis is proffered for the assertions about newspaper "influence" -- assertions that are contradicted by evidence that television stations are the primary source of news for most Americans. In any case, the Commission's diversity objective does not justify an attempt to limit or regulate the "influence" of different media on the public.

Equally baseless are contentions that a relaxed waiver policy would permit daily newspapers anticompetitively to exercise their alleged "market power" in newspaper advertising to injure competition in radio advertising. Newspapers and radio stations in fact compete with a broad range of other advertising vehicles. The anticompetitive conduct that is feared would be constrained by that competition. The antitrust laws, moreover, suffice to address any remaining risk of such behavior. The Commission should not deny the public the benefits of newspaper/radio cross-ownership simply to foreclose the theoretical possibility that a newspaper/radio combination might engage in conduct that the antitrust laws adequately deter.

The remaining arguments against relaxation are untenable. Recent trends toward the consolidation of ownership in radio do not impair the case for a waiver policy that would permit cross-ownership where the public would still enjoy a plethora of independent media choices, including radio stations. Arguments that newspapers with radio interests would fail to provide vigorous coverage of issues concerning broadcasting have multiple flaws: The rule does not prevent newspapers from owning radio stations in markets other than their own; under the

policies that we urge, a cross-owned newspaper's coverage (or lack of coverage) of local broadcast issues would be subject to critical examination by a host of competing media; and a policy of keeping newspapers out of radio in order to preserve their incentives to cover broadcast issues objectively would be at odds with the Commission's repeated refusal to prevent companies with nonbroadcast interests from owning broadcast stations. Finally, arguments that newspaper-owned radio stations would seek profit at the expense of resources devoted to news and that maintenance of a stringent waiver policy would materially enhance the prospects for female and minority radio station ownership are factually baseless.

We have proposed a standard under which waiver would presumptively be granted, without a weighing of specific countervailing benefits and without regard to the number of radio stations proposed for cross-ownership, in larger markets where 30 or more independent media voices would remain. There is no ground for arguments that such an approach is foreclosed by the legislative history of an appropriations act that has been superseded by subsequent legislation. Nor is there merit in the policy arguments against such an approach.

The Commission would remain free to consider circumstances that argue against waiver, even if the presumptive standard were met, or to grant waiver pursuant to a case-by-case balancing process, where the standard was not met. Such a standard is not rendered arbitrary by its failure to count all conceivable sources of information and opinion on local issues, or by its definition of a level of media diversity at which the potential benefits of cross-ownership should be deemed to outweigh its theoretical detriments. Moreover, such a standard does not warrant -- let alone require -- attempts to specify the relative "influence" of different media. Its reasonableness is not impugned by the inherent arbitrariness of such attempts.

RECEIVED
APR 2 1997
Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Newspaper/Radio Cross-Ownership Waiver Policy	)	MM Docket No. 96-197
	)	

To: The Commission

REPLY COMMENTS OF ABC, INC.

ABC, Inc. replies as follows to the comments filed February 7, 1997 in the above-entitled proceeding:

Introduction

Our opening comments show that the growth of local media choices since 1975 and the arbitrary discrimination against newspaper owners now embodied in the Commission's rules provide compelling reason for the Commission to relax its newspaper/radio cross-ownership waiver policy. They show also that waiver should be deemed presumptively appropriate in larger markets where cross-ownership would leave at least 30 independent media enterprises and that other situations should be considered case-by-case.[1/]

1/ Comments of ABC, Inc., filed Feb. 7, 1997 ("ABC Comments").

Only a few comments oppose any relaxation of waiver policy whatsoever.[2/] And only a few object to a presumptive waiver standard of the kind we have urged or propose substantially different approaches to the relaxation of waiver policy.[3/] We respond first to the opponents of *any* relaxation and then to the proponents of approaches to relaxation that differ from ours.

I. The Case for Relaxation is Unimpaired by Anything in the Opposing Comments

The opponents of a relaxed waiver policy rely largely upon claims concerning the alleged market power of daily newspapers generally, interspersed with assertions about their "influence" in the marketplace of ideas. That power and influence, it is said, have not diminished appreciably since 1975 and (together with trends toward consolidation in radio and other fields) justify a continuation of severe restraints on newspaper/radio cross-ownership generally.[4/] We discuss first the claims about newspaper "influence" and then those about newspaper market power. Finally, we address the significance of the changes that have occurred since 1975.

[2/] These include the comments of ADX Communications ("ADX Comments"), Mid-West Family Stations ("Mid-West Comments") and Independent Free Papers of America ("Free Papers Comments"). In addition, the comments of the Tennessee Association of Broadcasters ("Tennesee Broadcasters Comments") oppose any relaxation of waiver policy in smaller markets, and the comments of Black Citizens for a Fair Media et al. ("Black Citizens et al.Comments") oppose any "substantial relaxation."

[3/] These include the comments of Reading Eagle Company ("Reading Eagle Comments"), Journal Broadcast Group ("Journal Broadcast Comments") and Pathfinder Communications Corporation ("Pathfinder Comments"). In addition, the Black Citizens et al. Comments propose a narrow and cramped version of the presumptive standard that we have urged, and the Mid-West Comments object to particular elements of that standard.

[4/] Black Citizens et al. Comments 7, 11-20; ADX Comments 1-3; Mid-West Comments 2-4; Free Papers Comments 1-2.

A. A Restrictive Waiver Policy Cannot Be Justified By Claims That Newspapers Have Too Much "Influence"

The opposing comments assert that there is an overriding need to limit the "influence" of newspapers in markets of all kinds and sizes.[5/] That assertion falls abysmally short of justifying the current, restrictive waiver policy. As our opening comments show, the Commission's diversity objective provides no justification for a governmental attempt to limit or regulate the presumed "influence" of different media on the public.[6/] Moreover, the assertions that daily newspapers have inordinate "influence" on the public are just that -- bare, unadorned and unsupported appeals to intuition. Such assertions cannot supply a basis for Commission action.

Even in rulemaking or policy-making proceedings, where the Commission's discretion is at its zenith, its determinations must have *some* factual foundation.[7/] Simple appeals to intuition are not enough.[8/] This particular appeal to intuition, moreover, cannot be squared with the

---

[5/] That assertion, implicit in most of the opposing comments, is made explicit by the Mid-West Comments, at 5 ("a daily newspaper is likely to enjoy a relatively stable level of influence and power, and this influence is unlikely to vary according to the number of broadcast outlets available there").

[6/] ABC Comments at 12 n.20, 25-26.

[7/] See Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994); Ass'n of Data Processing Service Organizations,Inc. v. Bd. of Governors of the Federal Reserve System, 745 F.2d 677, 683-84 (D.C. Cir. 1984); National Resources Defense Council v. SEC, 606 F.2d 1031, 1053 (D.C. Cir. 1979); Almay, Inc. v. Califano, 569 F.2d 674, 681 (D.C. Cir. 1978).

[8/] "There was once a day when a court upheld the 'sensible judgments' of a board, say of tax assessors, on the ground that they 'express an intuition of experience which outruns analysis.' There may still exist narrow areas where this approach persists, partly for historic reasons. Generally, however, the applicable doctrine that has evolved with the enormous growth and significance of administrative determination in the past forty or fifty years has insisted on reasoned decision-making." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C.Cir. 1970), cert. denied, 403 U.S. 923 (1971), quoting Chicago B. & Q. Ry. v. Babcock, 204 U.S. 585, 598 (1907).

repeatedly documented fact that the primary source of news for most Americans is, not newspapers, but television.[9/] Indeed, that fact is one of the reasons for the Commission's tentative belief that it "cannot consider each . . . newspaper as being the equivalent of a broadcast television station for diversity purposes."[10/] As already noted, we do not believe that the Commission can properly assign different weights to different media "voices" in this fashion. But it is plain in any case that a decision by the Commission to continue imposing *more* severe restraints on newspaper/radio (than on television/radio) combinations could not be explained on the ground that newspapers generally have greater "influence."[11/]

B. A Restrictive Waiver Policy Cannot Be Justified By Claims That Newspapers Have Too Much Market Power

As our opening comments show, newspaper/radio cross-ownership does not generally present any threat to competition.[12/] Thus, we have shown that the 49% share of local

---

9/ See Data Storage Report, April 1, 1995, 1995 WL 7880195 ("As has been the case since Roper began studying the impact of television on the lives of Americans in 1959, television remains the dominant source of public service information, the primary source of news (72%), . . . and, compared to other news media, the most credible (51%)"). See also Feinsilber, "Poll: Many Doubt News Media," AP Online, Dec. 13, 1996 ("In a recent Louis Harris and Associates survey, 34% of participants said local TV news was their most important news source -- far more than the 17% who picked the network newscasts and the 15% who chose local newspapers.").

10/ Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 87-8, Further Notice of Proposed Rule Making, 10 FCC Rcd 3524, 3557-58 (1995).

11/ An explanation for an agency decision that "runs counter to the evidence before the agency" is "arbitrary and capricious." Motor Vehicle Manufacturers Ass'n v. State Farm Automobile Ins. Co., 463 U.S. 29, 43 (1983). Black Citizens et al. say (at 7) that "[n]ewspapers and television are the most important tools for shaping public opinion on local issues." They do not explain, however, how that proposition could justify a policy that discriminates in favor of television owners and against newspaper owners.

12/ See ABC Comments 17-24.

advertising in all media captured by daily newspapers in 1995, on which several commenters rely,[13] is not an accurate measure of the choices typically available to both local and national advertisers -- that a more accurate measure would be the 25.3% of all relevant revenues that newspapers captured in 1995.[14] We have shown also that, even where concentration in particular local advertising markets might be higher, there is no reason to anticipate that newspaper/radio cross-ownership would lead either to coordinated interaction among sellers or to unilateral exercises of market power.[15]

The opposing commenters allege that a newspaper/radio combination would use the profits obtained by exercising market power in newspaper advertising to subsidize predatorily low rates for radio ads or would engage in some form of "tie-in" or "integration" of radio advertising with newspaper advertising.[16] But the conduct these commenters fear is unlikely to be attempted, because of competition from close substitutes, such as direct mail and cable television.[17]

A newspaper that sought to force advertisers to purchase time on cross-owned radio stations would risk a loss of business to direct mail providers offering print advertising without

---

[13] See Mid-West Comments 2; Tennessee Broadcasters Comments 5.

[14] The latter figure would imply that, in most geographic markets, concentration of advertising sales is low. See ABC Comments 18-19 & Appendix A. The Tennessee Broadcasters assert that the *Knoxville News-Sentinel* captured 38.1% of the "media revenue" in its market. See id. at 5 n.9, citing *Duncan's Radio Market Guide* (1996). That source, however, excludes from "media revenue" the revenues earned by direct mail, miscellaneous and point-of-purchase advertising vehicles (all of which, as we have shown, belong in the product market).

[15] See ABC Comments 19-21.

[16] See ADX Comments 3; Mid-West Comments 3; Tennessee Broadcasters Comments 6.

[17] See ABC Comments 20-21& 23 at n.52.

the undesired radio station tie-in.[18] Similarly, even in the unlikely event that a newspaper-owned radio station successfully drove its radio rivals out of business through predatory price-cutting (drawing on its newspaper owner's presumed "deep pockets"), competition from cable systems would constrain the station's ability later to charge the above-market rates needed to recoup the revenues its predatory practices had required it to sacrifice.[19]

Any risks of anticompetitive conduct that might be thought to remain are fully addressed by the antitrust laws and neither require nor warrant a special response from the Commission.[20] More than a decade ago, the Commission abandoned a policy of generally forbidding combination sales by co-owned (as well as independently owned) radio and/or television stations. It found that the antitrust laws were a sufficient deterrent to combination selling that was truly anticompetitive and that the public should not be deprived of the benefits of combination selling of a kind that the antitrust laws permit.[21] A fortiori. the Commission should

---

[18] See Jefferson Parish Hosp. Dist. No. 2 v. Hyde ("Jefferson Parish"), 466 U.S. 2, 13-14 (1984) (tying arrangements are condemned "when the seller has some special ability -- usually called 'market power' -- to force a purchaser to do something he would not do in a competitive market").

[19] See Brooke Goup Ltd v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) ("[f]or the investment [in predation] to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered").

[20] As a general matter, the Sherman Act would forbid a newspaper/radio combination to exert market power unreasonably to raise prices or exclude competitors. See, e.g., Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

[21] Elimination of Unnecessary Broadcast Regulation, Second Report and Order, MM Docket No. 83-842, 59 Rad.Reg.2d (P&F) 1500,.1511, 1514-17 (1986), recon., 2 FCC Rcd 3474 (1987). In view of the procompetitive benefits that bundled sales of different products may confer, such sales will be found to violate the antitrust laws only in narrowly defined circumstances. See, e.g., Jefferson Parish 466 U.S. at 12 (1984). Similarly, pricing that may seem to a competitor predatorily low may in fact be entirely procompetitive. See Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986).

not deprive the public of the likely benefits of newspaper/radio cross-ownership because of the bare possibility that a newspaper/radio combination might engage in conduct of a kind that the antitrust laws adequately deter.

C. The Commission Should Not Be Deterred From Proceeding With A Fully Warranted Relaxation Of Its Waiver Policy By The Actual Or The Alleged Trends Toward Ownership Consolidation

Several of the opposing comments seek to found arguments against relaxation on the ownership consolidation in the radio industry that has followed the enactment of the Telecommunications Act of 1996. Black Citizens et al. say that the trend in radio ownership, coupled with consolidation in television, cable and telephony, argues for caution in relaxing newspaper/radio restrictions.[22/] Mid-West, in contrast, celebrates increased ownership consolidation in radio, on the ground that it helps (some) radio operators to compete against newspapers, but inveighs against any broadened entry by newspapers into radio because of the feared competitive effect of such entry on the new multiple-station radio moguls.[23/]

Assuming (as we do) that Mid-West's plea for protection against competition will elicit no sympathy from the Commission, we address here the argument of Black Citizens et al. We have shown in our opening comments that increased consolidation in radio does not argue against a major relaxation of the Commission's waiver policy.[24/] The diversity at which the newspaper-broadcast rule is aimed is *local* diversity. Contrary to the suggestion of Black Citizens et al., the

---

22/ See Black Citizens et al. Comments 11-15.

23/ See Mid-West Comments 3-4.

24/ See ABC Comments 10.

number of stations that a given party owns nationwide bears only indirectly on that objective.[25/] In any case, the diversity that the rule seeks does not depend on radio station owners alone. If the public enjoys a plethora of independently controlled print, television broadcast and cable outlets, *along* with independently controlled radio stations, the number who speak to it through radio is immaterial.

The argument of Black Citizens et al. is not strengthened, moreover, by their attempt to portray newspaper/radio cross-ownership as a growing threat to the independence and objectivity with which newspapers cover issues affecting the broadcast industry.[26/] Even if the Commission could properly rule the owners of competing media ineligible to hold broadcast licenses in order to ensure the vigor with which those media cover broadcast issues,[27/] the newspaper/broadcast rule disqualifies newspapers only in their own markets. It does not foreclose the taint against which Black Citizens et al. would protect newspaper owners. Under the presumptive waiver standard that we urge, moreover, a failure by a newspaper with one or more affiliated local radio stations to cover local broadcast issues -- or the provision of coverage influenced by its radio interests -- would be subject to criticism from a wide array of competing print, broadcast and cable competitors.

[25/] Black Citizens et al. Comments 14. The rule's goal is threatened even less by "the creation of Time Warner/Turner, the world's largest media company, and Bell Atlantic/Nynex, the largest regional telephone company in the United States since 1987." Id. at 14-15.

[26/] Id. at 15-17, 20-23.

[27/] Constitutional issues aside, we note that the Commission has repeatedly rejected contentions that it should rule companies with major interests in nonbroadcast businesses ineligible to hold broadcast licenses in order to ensure the vigor and objectivity with which broadcast stations cover issues relating to those other businesses. See RCA Corp. (G.E. Merger), 60 Rad.Reg.2d (P&F) 563, 572-73 (1986); ABC-ITT Merger, 9 F.C.C.2d 546, 576 (1967); Powel Crosley,Jr., 11 F.C.C. 3, 14-19 (1945).

So, too, it is absurd to suppose -- as Black Citizens et al. would have the Commission suppose -- that newspaper-owned radio stations are more likely than stations with no links to other media to seek "increased economic efficiency" at the expense of the resources they devote to news staff and facilities.[28/] And it is equally implausible to suppose that the chances for women and minorities to acquire radio stations are materially enhanced because, although they must compete against the widest range of established businesses (including co-located television and radio station owners), the maintenance of a restrictive newspaper/radio waiver policy ensures that they need not compete against co-located newspapers.[29/]

II. The Objections To Waiver Standards Of The Kind We Have Proposed Are Meritless

We have proposed, in our opening comments, a "30 Voices" or "Top 50 Markets/30 Voices" standard to define the cases in which waiver would presumptively be appropriate.[30/] We have also urged (i) that this standard should count equally all daily and weekly newspapers, television stations, radio stations and cable channels that have the capacity to act as "local outlets" for the area of concern,[31/] (ii) that the area of concern should be defined by the overlap between the principal area of circulation for the relevant newspaper and the principal area served by the relevant radio station (which, for most stations, will be their Arbitron Radio Metro

---

28/ See Black Citizens et al. Comments 16-17. The historical record is to the contrary. See Multiple Ownership of Standard, FM and Television Broadcast Stations, Report and Order, 50 F.C.C.2d 1046, 1078 n.26, recon., 53 F.C.C.2d 589 (1975), aff'd, 436 U.S. 775 (1978).

29/ See Black Citizens et al. Comments 20-23.

30/ See ABC Comments 12-23.

31/ Id. at 24-27.

Areas),[32] and (iii) that cross-ownerships between daily newspapers and radio stations located outside of any Metro Area are exceptional situations that should not govern the Commission's overall approach.[33]

We respond here to those who would take a substantially different approach.[34] Black Citizens et al. argue that the Commission is legally constrained to defer to the approach to waiver prescribed by the Conference Committee on the 1994 appropriations for the Commission. They urge a version of that approach which is modified and supplemented so as to decrease its scope and increase its rigor.[35] Journal Broadcast and Mid-West, on the other hand, oppose *any* presumptive standard; Reading Eagle and Pathfinder urge presumptive waivers for their own, limited situations.[36] None of these positions is tenable..

---

[32] Id. at 27-34. We have urged, in this regard, that radio stations in the Metro Area and TV stations in the DMA should be deemed to serve the area of concern, along with other media available in that area. See id.

[33] Id. at 34-35.

[34] We note, however, that the Joint Comments of Cox Enterprises, Inc. and Media General, Inc. ("Cox /Media General Comments") -- which urge a generally similar approach -- suggest (at 18) that the standard for presumptive waiver should employ a geographic market based on specified coverage contours of the relevant stations, on the ground that these contours define the scope of the rule of which waiver is sought. In fact, those comments do not consistently urge the use of the standards embodied in the rule (see id. at n.51). Moreover, although no standard will fit all cases, the circulation-area/metro-area approach that we propose has the merit of recognizing the basic realities of newspaper and radio operation -- a virtue that outweighs, we submit, the logic argued by Cox and Media General. The Commission plainly came to the same conclusion in regard to the radio/TV cross-ownership rule, for it adopted a geographic standard for that purpose much like the one we propose, even though the scope of that rule (like the scope of the newspaper/broadcast rule) is defined on a contour-encompassment basis.

[35] Black Citizens et al. Comments 23-33.

[36] The Journal Broadcast Comments argue (at 9-11) for a case-by-case weighing of the benefits and detriments of cross-ownership, so as to allow Journal Broadcast to own a newspaper and more than two radio stations (as well as a television station) in Milwaukee. The Mid-West

A. TheApproach Urged By Black Citizens Et Al. Is Neither Legally Compelled Nor Sound As A Matter of Policy

The 1994 appropriations legislation lifted, for the first time, a restriction previously imposed on the Commission's ability to change its waiver policies on newspaper/radio cross-ownership (while maintaining restrictions on its ability to change the underlying rule or its waiver policies on newspaper/television cross-ownership). The conference committee report stated the committee's intention that the Commission exercise its new freedom to grant waivers "only in the top 25 markets where at least 30 independent broadcast voices remain in the market after the transfer is completed" and that the Commission also find "that such a transfer is otherwise in the public interest, based upon the applicants' showing that there are specified benefits to the service provided to the public sufficient to offset the reduction in divesity which would result from the waiver."[37/]

Black Citizens et al. argue (i) that the authority of these views survived the 1996 appropriations legislation (which eliminated all restrictions on the Commission's ability to revise the rule or its waiver policies) and (ii) that the failure of the 1996 Telecommunications Act to include a provision of the House bill that would have eliminated substantially all restrictions on cross-ownership of broadcasting and other media reflected a Congressional policy hostile to relaxation of newspaper/radio restrictions beyond the metes and bounds indicated in connection

---

Comments attack objective standards (at 4-5) in support of their general position that existing waiver standards should be maintained. The Reading Eagle Comments propose (at 16-17) a standard that would allow the owner of a newspaper/AM radio station combination (such as itself) to acquire a single FM station (or vice versa). Pathfinder argues for waiver in any market where "more than one daily newspaper serves the area within the radio station's principal city contour and the second newspaper has comparable circulation to the first." Pathfinder Comments 1.

37/ H. Rep. No. 103-293, 103rd Cong., 1st Sess. 40 (1993).

with the 1994 appropriations.[38] They then proceed to argue that any presumptive standard adopted by the Commission must be limited to cases in the top 25 markets where 30 or more independently owned broadcast licensees would remain, where the applicant would own no more than one AM station, one FM station and one newspaper, and where the applicant has demonstrated that "specific and quantifiable public interest benefits" outweigh the loss in diversity.[39]

This is surely one of the more egregious instances on record of an attempt to exalt legislative history over statutory substance. Black Citizens et al. maintain that the 1996 appropriations legislation did not supersede the policy views expressed in connection with the 1994 appropriations because Congress took the later action without comment.[40] But Congress was not silent. It spoke in the way that legislative bodies typically speak, by enacting legislation that (in this case) swept away *all* restrictions on the Commission's ability to revise, not merely its waiver policies in regard to radio, but the rule itself as applied to radio *or* television. There is not the slightest basis for any inference that, in taking that action, Congress intended to preserve the cautionary guidance with respect to radio waivers it had provided before it was persuaded to leave the entire matter to the Commission's normal discretion.[41]

---

[38] Black Citizens et al. Comments 8-11.

[39] Id. at 23-33.

[40] [W]here Congress makes its intent clear in legislation and accompanying conference reports over a period of years," they say, "a solitary omission in the current year is inconclusive and, therefore, has no significant effect." Moreover, "[a]bsent clear Congressional language to the contrary, Congress' last positive expression of intent regarding the proper implementation of the waiver policy deserves the highest level of deference." Id. at 9-10 n.14.

[41] It is perhaps superfluous to note that Congress also did *not* make its intent clear "in legislation and accompanying conference reports over a period of years." Black Citizens et al.

The argument concerning the provisions that the Telecommunications Act of 1996 did *not* contain is equally weak. Southern Packaging and Storage Co. v. United States, 588 F.Supp. 532, 549 (D.S.C. 1984) -- which Black Citizens et al. cite (at 10 n.14) in support of their interpretation of the supposed silence of Congress in the 1996 appropriations legislation -- actually applies the long established proposition that "unsuccessful attempts at legislation, such as the rejection of amendments, are not reliable guides to legislative intent."[42/] That proposition applies here as well. Black Citizens et al. proffer nothing to suggest that, in rejecting radical deregulation of cross-ownership generally, Congress meant to order -- or even encourage -- the Commission to maintain or adopt any particular attitude toward newspaper/radio cross-ownership.[43/]

There is thus no foundation for any suggestion that the Commission's discretion in the current proceeding is constrained by the legislative history on which Black Citizens et al. rely. Indeed, the proponents of this argument themselves feel free to depart from the conference report on the 1994 appropriations act when they choose. Nothing in that report supports the proposal of Black Citizens et al. that the Commission confine waivers to cases in which only one AM and/or one FM station is to be cross-owned. To the contrary, in stating its views on newspaper/radio restrictions, the conference report took explicit note of the Commission's then recent relaxation

---

rely on two appropriations acts and one conference report. Id. at 9 n.14.

42/ 588 F.2d at 549, citing United States v. Wise, 370 U.S. 405, 411 (1962) and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 n.11 (1969).

43/ As the Cox/Media General Comments point out, to the extent that House opponents of cross-ownership deregulation had focussed specifically on the newspaper/broadcast rule, they urged the retention of newspaper/television restrictions and failed to mention radio. See id. at 5 n.17, citing H.Rep. No. 104-204, 104th Cong., 2d Sess. (1995) at 220.

of the radio duopoly rules to allow ownership of more than two radio stations in a single market.[44/]

Hostility to cross-ownership of more than one or two radio stations is in any case baseless. Black Citizens et al. themselves quote WSB,Inc. v. FCC, 85 F.3d 695, 701 n.15 (D.C. Cir. 1996), to the effect that "[t]he 'presumptive waiver rule' [for radio/TV cross-ownership] is 'based on the fact that a very large number of broadcast outlets and separate voices will remain in these large markets, thereby preventing any single outlet or firm from obtaining undue economic power or undue sway over public opinion.'"[45/] Unlike the Court of Appeals, however, they fail to recognize that such a rationale provides no reason for hostility to the cross-ownership of multiple radio stations where a sufficient number of independent outlets would remain.[46/]

B. There Is No Foundation For The Other Objections To Waiver Standards Such As Those We Have Urged

The parties who object to presumptive waiver standards such as those that we favor do so essentially on the ground that the issues are too complex and subtle to be captured in any single formula. But that contention is vitiated by a series of mistaken assumptions concerning the nature and function of a presumptive waiver standard such as the one embodied in the radio/TV cross-ownership rule and the one that we urge here.

[44/] H. Rep. No. 103-293, supra at 40.

[45/] Black Citizens et al. Comments 25 n.42.

[46/] See ABC Comments 22-23. Similarly meritless are the insistence of Black Citizens et al. upon a case-by-case weighing of specific "countervailing" public benefits against the theoretical loss of diversity (even where the presumptive standard is met) and on a limitation of the "voices" counted in applying the presumptive standard to broadcast station owners. See ABC Comments 14-15, 24-27.

In the first place, such a standard does not purport to determine conclusively whether or not any particular waiver should be granted. The Commission remains free to consider circumstances that argue against waiver, even where the standard is met, or to grant waiver pursuant to a case-by-case balancing process, where the standard is not met. Thus, Journal Broadcast's chances to obtain a waiver pursuant to the case-by-case process it prefers would not be impaired if it were unable to meet the presumptive standard. The same opportunity would be available to Reading Eagle and Pathfinder.[47/]

On the other hand, while we strongly agree that the presumptive standard should count a wide array of media in determining the level of diversity in any given market,[48/] the promotion of uniformity and predictability in the application of the Commission's waiver policy is an important part of the service that the presumptive standard is designed to perform. That objective requires that a line be drawn *somewhere*. Contrary to the claims of Reading Eagle, the line we have urged is not rendered arbitrary by the fact that it does not include, for example, MMDS, satellite-delivered radio services or other media that convey *only* information from distant sources (despite the undoubted relevance of such information to many or most of the

---

[47/] These parties supply no convincing reason why waiver should be *presumptively* granted, without regard to the other factors normally weighed in the case-by-case process, whenever there are two local daily newspapers or a newspaper seeks to add a single FM to a single AM station.

[48/] On reflection, we believe that we erred in not including local magazines that are available to residents of the relevant area -- the contribution of which to diversity we had recognized (ABC Comments at 10 n.17) -- among the media that the presumptive standard should count.

"local" issues in many communities).[49] These and other examples urged merely confirm that the diversity judgment embodied in the proposed standard would be a conservative one.

In the second place, that judgment does not -- as Reading Eagle supposes -- express a view on the number of media "voices" needed to provide "adequate" viewpoint diversity in any community.[50] The judgment is rather that the independent avenues of access to the public are sufficiently numerous to make the potential benefits of cross-ownership more important than the theoretical loss of diversity. While that judgment too involves line-drawing, it is none the worse for that reason.

Finally, for reasons already discussed at length in these and our opening comments, the presumptive standard does not warrant -- let alone require -- attempts to specify the relative "influence" of different media. Indeed, the conundrums on that topic that Reading Eagle postulates vividly illustrate the strength of our position.[51]

---

[49] See Reading Eagle Comments 8-10, 14-15. Cf., Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting) ("When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, . . . to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the Legislature must be accepted unless we can say that it is very wide of any reasonable mark.").

[50] See Reading Eagle Comments 12-13.

[51] See id. at 11-12.

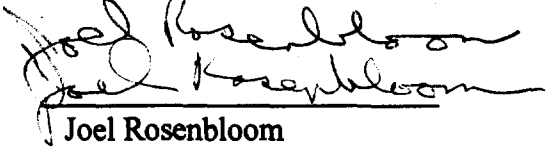
CONCLUSION

For the foregoing reasons, the Commission should relax its newspaper/radio waiver policies by adopting a standard that contemplates presumptive waiver in the larger markets where 30 or more media "voices" would remain and a case-by-case evaluation of waiver in other circumstances.

Respectfully submitted,

ABC, Inc.

by Wilmer, Cutler & Pickering



Joel Rosenbloom
James S. Campbell
Ali Stoeppelwerth
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6216

Its Attorneys

Of Counsel:

Alan Braverman
Senior Vice President &
General Counsel
Sam Antar
Vice President - Law
& Regulation

ABC, Inc.
77 West 66th Street
New York, New York 10023

March 21, 1997

CERTIFICATE OF SERVICE

I, Annabel Collins, hereby certify that on this 21st day of March, 1997, I caused copies of the foregoing "Reply Comments of ABC, Inc." to be served, by hand or by United States mail, first class postage prepaid, on the following:

Hon. Reed E. Hundt, Chairman *
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Hon. James H. Quello, Commissioner *
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Hon. Rachelle B. Chong, Commissioner *
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Hon. Susan Ness, Commissioner *
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Julius Genachowski, Esq. *
Office of the Chairman
Federal Communications Commission
1919 M Street, N. W.
Room 814
Washington, D.C. 20554

Marsha J. MacBride, Esq. *
Office of Commissioner Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Jane Mago, Esq. *
Office of Commissioner Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Anita Wallgren, Esq. *
Office of Commissioner Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Roy J. Stewart, Chief *
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

Renee Licht, Deputy Chief *
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

* Service by Hand

Douglas W. Webbink, Chief *
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 536
Washington, D.C. 20554

Bruce A. Romano, Deputy Chief *
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 536
Washington, D.C. 20554

William E. Kennard, Esq. *
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, D.C. 20554

Roger Holberg, Esq. *
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 550
Washington, D.C. 20554

Danny A. Bring *
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 534-A
Washington, D.C. 20554

Robert M. Pepper, Chief *
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W.
Room 822
Washington, D.C. 20554

Jackie Chorney, Esq. *
Office of the Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Gregory Rosston *
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W.
Room 822
Washington, D.C. 20554

John Nakahata, Esq. *
Chief, Competition Division
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 658
Washington, D.C. 20554

Werner K. Hartenberger, Esq.
John R. Feore, Jr., Esq.
Suzanne M. Perry, Esq.
Peter J. Siembab, Esq.
Dow, Lohnes & Albertson
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

* Service by Hand

Thomas Walker
Chief Financial Officer
Mid-West Family Stations
2740 Ski Lane
Madison, Wisconsin 53713

Karen M. Edwards, Esq.
Angela J. Campbell, Esq.
Georgetown University Law Center
Institute for Public Representation
600 New Jersey Avenue, N.W., Ste. 312
Washington, D.C. 20001

Lawrence R. Cohen, Esq.
Cohn and Marks
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, D.C. 20036

Harry C. Martin, Esq.
J. Todd Metcalf, Esq.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street, 11th Floor
Rosslyn, Virginia 22209

Victor Jose, Chairman
Constitution and Competition Division
Independent Free Papers of America
393 South High Street
Covington, Ohio 45318

Peter Tannenwald, Esq.
Elizabeth A. Sims, Esq.
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W., Suite 200
Washington, D.C. 20036-3101

Andrew Jay Schwartzmann, Esq.
Gigi Sohn, Esq.
Joseph S. Paykel, Esq.
Media Access Project
1707 L Street, N.W., Suite 400
Washington, D.C. 20036

Richard S. Rodin, Esq.
Steven F. Morris, Esq.
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

David E. Hoxeng d/b/a
ADX Communications
Post Office Box 39454
San Antonio, Texas 78218-1454

Annabel Collins

Annabel Collins